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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-608

LOUIS NIZER, DOUBLEDAY & CO., INC. and FAWCETT PUBLICATIONS, INC.,
Petitioners,

v.

MICHAEL MEEROPOL and ROBERT MEEROPOL,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Preliminary Statement

As demonstrated in the petition for certiorari this case presents for review a novel question which has never been decided by this Court. That question is the extent to which an author who has written on a matter of great public and historical interest and in support of his presentation has made limited use of copyrighted original source materials, must subordinate his First Amendment rights and the

corresponding right of the public to be fully informed, to the interest of a copyright proprietor, particularly one who is using the Copyright law to suppress the author's opinion. Respondents' Brief In Opposition actually underscores the need for certiorari to resolve the question of the relationship between the Copyright law and the First Amendment. The facts which squarely present that issue remain undisputed.

The Facts Which Raise the First Amendment Question Are Not in Dispute.

The facts demonstrate the respondents have been using the Copyright law and this lawsuit to suppress petitioners' opinion that the Rosenbergs received a fair trial. Respondent launched a nationwide campaign to reopen their parents' conviction by bringing this lawsuit. (See pages 7 through 12 of the petition for certiorari). It is therefore these pages which squarely present the question of the relationship between the First Amendment and the Copyright law which is the subject of this petition. Yet, respondents attempt to strike these very pages. It is highly significant that respondents' motion to strike does not put in issue any of the facts set forth on these pages which support the conclusion that petitioners are using the Copyright law for ulterior purposes but only the conclusion itself.

However, that conclusion is not only the petitioners', it is the one reached by the Court of Appeals for the second Circuit and the United States District Court for the Southern District upon the evidence. It is these Courts that have already found that through the medium of this action

respondents were "seeking to retry issues of the Rosenberg case rather than direct [themselves] to the issues" and "that what is really desired [by respondents] is a trial of the accuracy and fairness of defendants' book and its implicit conclusion that the controversial Rosenberg trial was fair" (petition for cert. pp. 10-11).

Furthermore, it is equally significant that respondents have not disputed the facts which demonstrate that quotation from the letters themselves are important to any historical study of the Rosenberg case. Thus, respondents do not deny that the letters involved herein were written by the Rosenbergs for the express purpose of calling the attention of the world to the alleged injustice of their conviction and sentence of death and that they were never intended to be the private correspondence of two anonymous individuals. Nor do petitioners dispute the fact that it is the form of expression used in the letters by the authors which provides the emotional impact which Julius and Ethel Rosenberg sought to achieve, and that without the form of expression that emotional impact is lost.

Accordingly, the facts of this case squarely present the type of situation with respect to which Professor Nimmer believed that First Amendment considerations required that the interest of the copyright proprietor be subordinated. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L.Rev. 1180 (1970).

Respondents Have Distorted the Record Facts and Misinterpreted the Decision by the Court of Appeals.

In an effort to blunt the impact of the First Amendment questions raised by the petition, respondents have distorted the record facts in order to create the impression that this case is not yet ripe for review by the Court. Actually, the record is more than complete to resolve the important constitutional question involved herein.* While it is not petitioners' intention to correct every misstatement contained in respondents' brief, those misstatements which bear on the amount of the alleged copying and the marketability and commercial exploitability of *Death House Letters* cannot remain uncorrected.

Thus, for example, respondents' statement that the "copyrighted letters" appear in the "last 125 pages" of *The Implosion Conspiracy* (Brief, p. 5) is patently false. The fact is, that all of the challenged excerpts appear on parts of only seventeen pages, between pages 393 and 439, of petitioners' book (210a). Similarly, respondents' attempt to increase the amount of the respondents' claim by an additional 1058 words (Brief, p. 6n) is untrue. These additional excerpts come principally from a petition for executive clemency which was never the subject of Copyright, and a letter, neither of which was ever printed in *Death House Letters*. They are simply not involved in this case.

* Contrary to the statement at page 7 of respondent's brief, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, —— U.S. ——, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977) does *not* bear "upon the need and the right to protect copyrighted property in the face of a First Amendment claim." Indeed, that case did not even involve a copyright claim.

Equally baseless is the respondents' statement that sales of *Death House Letters* throughout the world numbered in the "hundreds of thousands" (Brief, p. 4). The veracity of that statement is best judged by the fact that it is not accompanied by any citations to the record. The fact remains that the only record of sales of *Death House Letters* are those of its long-dissolved publisher, Jero Publishing Co., and its alleged successor (The Rosenberg Children's Trust Fund). These records, already in evidence, demonstrate that the total gross income from sales of *Death House Letters* was only $12,000 and that no sales have occurred since 1956 (220-21a).

In addition to misstating the record, respondents have misinterpreted the decision of the Court of Appeals in an effort to create issues of fact where none exist. Thus, the Court of Appeals did not hold that the "district court had erred in finding as a matter of fact" that the alleged copying was "insubstantial" (Brief, p. 7). The Court of Appeals only held that as the trier of the facts with respect to petitioners, Nizer and Doubleday, the District Court had erred in upholding the defense of fair use "in the absence of evidence on the question of damages" (A21).* As demonstrated (petition pp. 22-24) respondents never submitted any evidence on this issue to counter petitioners' conclusive showing in this regard. Consequently, the District Court's judgment should have been affirmed on factual findings. If this Court were to find that the Circuit Court erred in this respect, under well-established principles of collateral estoppel, any finding of fact by the District Court

* Nor do the six "issues" itemized by respondents at pages 6-7 of their brief come from the Court of Appeals decision as they are made to appear. Indeed, the last three "issues" are really one and the same.

in connection with the case against Nizer and Doubleday would also bind respondents with respect to their case against Fawcett, even though in that case respondents have demanded a jury. See, *Shore* v. *Parkland Hosiery Inc.*, —— F.2d ——, slip op. pp. 157-175 (2d Cir. November 1, 1977).

This Court Should Grant the Petition and Determine the Relationship Between the First Amendment and the Copyright Law.

Nothwithstanding respondents' protestations to the contrary, the petition for certiorari presents constitutional and federal questions of sufficient importance within the meaning of Rule 19 to warrant review by this Court. Furthermore, although the specific constitutional question was not raised in the answers filed by the petitioners as an affirmative defense to the Copyright Count, it was raised by the District Court opinion and briefed by petitioners in the Court of Appeals. That is sufficient to preserve it for review by this Court. *Cf. Jenkins* v. *Georgia,* 418 U.S. 153, 157 (1974).*

Just what limitations the First Amendment imposes upon the Copyright law will be fully discussed in the brief on the merits. However, a number of possibilities are readily apparent.

First, this Court could decide that where, as here, a copyright proprietor is using the Copyright laws for the purpose of suppressing the First Amendment right of an

* In addition, many of the facts which support the constitutional defense surfaced *after* the answers to the complaint had already been filed. Moreover, the answers did assert the defense of fair use, a defense which is related to the First Amendment issue.

author to express his opinion on a matter of public interest as well as the public's constitutional right to be informed, his proprietary interest must be subordinated. In such a case, a claim of statutory copyright infringement would have to be dismissed regardless of the amount of copying or the potential impairment of the value of the copyrighted material. (See petition for cert., p. 14.)

Second, this Court could hold that where, as here, the defendant's work is one of public interest, as determined by the Court from a reading thereof, there is an immunity from the Copyright law for quantitatively insubstantial copying, and all other elements of the traditional defense of fair use are to be disregarded. (See petition, page 18.) Since the Circuit Court did not disturb the District Court's finding as the trier of the facts of quantitatively insubstantial copying, such a test would necessarily result in a judgment for the petitioners.*

Third, this Court could hold that where the copyrighted material (including the form in which it is expressed) is of legitimate "public interest," the potential impairment of its commercial exploitability by the allegedly infringing work should be disregarded in determining the applicability of the defense of fair use. This is an approach suggested by Professor Nimmer. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. Rev. 1180, 1201 (1970). The application of such an approach to the facts of this case would again necessarily result in a dismissal of the com-

* As stated earlier, any determination by the District Court as the trier of the facts with respect to Nizer and Doubleday would be entitled to collateral estoppel effect in the action against Fawcett.

plaint since the decision by the District Court as the trier of the fact was reversed solely for its alleged failure to take evidence on the potential impairment of the commercial exploitability of *Death House Letters* as a result of *The Implosion Conspiracy.*

Fourth, this Court could hold that where, as here, the defendant's work is one of public interest, as determined by the Court from a reading thereof, the use by the defendant is presumptively "fair." The plaintiffs would have the opportunity to show by clear and convincing evidence that the elements of the fair use defense have not been met. Thus, in effect, the burden of proof would be shifted to the plaintiffs who would be required to prove an "unfair use" in order to prevail. Once again, such a test would require a dismissal of the complaint herein since the decision by the District Court as the trier of the facts was affirmed in all respects except for the failure to take evidence on the issue of damages. As above indicated (page 5), the respondents offered no evidence on the issue of damages in opposition to the petitioners' documented demonstration of no possible damage. Accordingly, the respondents would have failed to meet their burden of proof under this test.

Fifth, adopting a more limited approach, this Court could hold that where the material copied was written by a public figure who has since died, and an author-defendant's work is one of the public interest as determined by the Court from a reading thereof, a quantitatively insubstantial usage is not an infringement. This would make the Copyright law somewhat analogous to the right of privacy, which ends at death. Once again, such a test would lead to

dismissal since the District Court's finding as the trier of the facts that the amount of copying was insubstantial was not disturbed by the Court of Appeals.

Undoubtedly, there are other possible formulations which, upon certiorari, the Court and counsel could analyze and which would also provide a proper balance between the legitimate interests of the copyright proprietor and the mandate of the First Amendment.

Conclusion

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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